Filed 2/11/09 Epstein v. BDO Seidman CA2/7

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

BARRY EPSTEIN, et al., Plaintiffs and Appellants, v. BDO SEIDMAN, LLP, Defendant and Respondent.	B207187 (Los Angeles County Super. Ct. No. BC378249)

APPEAL from a judgment of the Superior Court of Los Angeles County. Ann I. Jones, Judge. Affirmed.

Nagler & Associates, Lawrence H. Nagler and David F. Berry for Plaintiffs and Appellants.

DLA Piper LLP, Jeffrey A. Rosenfeld, William P. Donovan, Jr. and Yvette Neukian for Defendant and Respondent.

Barry Epstein, Shawn Denton, Adam Levine and Jason Shapiro (the "Owners") appeal from judgment of dismissal entered after the trial court sustained a demurrer without leave to amend their complaint alleging a cause of action for fraud against respondent BDO Seidman, LLP ("fraud complaint"). The trial court dismissed the complaint based on the application of the doctrine of res judicata. The court concluded that Owners' fraud complaint was seeking relief for the same primary right and injury as Owners asserted in a prior complaint asserting a claim for negligent misrepresentation which was dismissed and affirmed on appeal in July of 2007. On appeal before this court, Owners assert res judicata does not preclude its current fraud claim discovered after the first action was filed where it was prevented from asserting the fraud facts in the first action. In the alternative, Owners argue that application of res judicata should be denied when injustice would result or that BDO should be estopped (or deemed to have waived) the res judicata argument. As we shall explain, these arguments are unavailing, and we therefore affirm.

PROCEDURAL AND FACTUAL BACKGROUND[1]

In the complaint alleging a negligent misrepresentation claim filed by Owners in March 2006 in *Epstein I* and in the fraud complaint at issue in this appeal, Owners contend they were directors and 25 percent owners of Rekaren, Inc. (Rekaren), a company in the business of originating and selling subprime residential loans. American Business Financial Services, Inc. (American) was in the business of originating, selling and servicing subprime home equity loans.

BDO audited American's financial statements for the fiscal year ending June 30, 2003, (Audited Financial Statements) and issued an opinion letter (Opinion Letter) representing that the Audited Financial Statements "'present fairly, in all material

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[1] Relevant portions of the background facts have been adopted from this district's Division Two appellate opinion in *Epstein v. BDO Seidman, LLP* (case No. B192278) 2007 WL 1991409 (hereinafter as *Epstein I*).

respects, the consolidated financial position of [American] and subsidiaries as of June 30, 2003 and 2002, and the consolidated results of their operations and their cash flow for each of the three years in the period ended June 30, 2003[,] in conformity with accounting principles generally accepted in the United States of America.'"

In December 2003, Owners entered into a deal to sell all of Rekaren's assets to American in exchange for $475,000, plus a 15 percent equity interest. The American-Rekaren deal gave Owners executive positions within American or its wholly owned subsidiary, Home American Credit, Inc. American declared Chapter 11 bankruptcy on January 21, 2005, which was converted to Chapter 7.

In the *Esptein I* negligent misrepresentation complaint and in the fraud complaint at issue here, Owners alleged the assets of American were, as reflected in the Audited Financial Statements substantially overvalued -- the "discount rates and valuations were based on extremely aggressive assumptions not warranted either by comparison to other companies within the industry or the specific circumstances of [American]." They also alleged that when they entered into the deal to purchase American they relied on the Audited Financial Statements and the opinion letter BDO prepared. Owners further claim that because BDO did not use generally accepted accounting principles (GAAP), those documents overvalued American's servicing rights and interest only strips.[2] Finally, Owners allege that but for their reliance on the Audited Financial Statements and the Opinion Letter they would not have entered into the deal to purchase American and as a result of the transaction they lost millions of dollars.

Demurrer and Appeal in *Epstein I*. BDO filed a demurrer to the negligent misrepresentation complaint, arguing that it was legally defective under *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370 *(Bily*) because it did not allege: (1) American's retention of BDO was designed to benefit the owners; (2) BDO generated the Opinion

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[2] American transferred the securitized loans it originated but retained servicing rights to the loans and an interest in the cash flow generated by those loans. That cash flow is known as "interest-only strips."

Letter to benefit Rekaren or the owners; (3) BDO was retained to work on the American-Rekaren deal; (4) Rekaren or its owners had any contacts with BDO; (5) BDO undertook an obligation to supply information to Rekaren and the owners; (6) BDO issued any documentation for the American-Rekaren deal; (7) BDO gave permission to American to republish its opinion for use in connection with the American-Rekaren deal; and (8) American republished the opinion letter specifically for the American-Rekaren deal. The trial court sustained the demurrer without leave to amend and entered judgment for BDO, concluding the complaint failed under *Bily*.

Owners appealed. Three days after the appeal in *Epstein I* was filed, American's bankruptcy trustee sued various defendants (though BDO was not named as defendant) in the United States District Court of the Eastern District of Pennsylvania (Pennsylvania action). The complaint in the Pennsylvania action contained allegations pertaining to the services BDO rendered to American. According to the information Owners gleaned from the Pennsylvania action, Owners claimed BDO was "an intentional and knowing participant in [American's] fraudulent financial statements;" was involved in the creation of the financial statements and that BDO, rather than simply opining on the value of American's assets, determined the value of the assets and interests. The Court of Appeal, Division 2 of this district granted Owners' request to take judicial notice of the Pennsylvania Action.

In the appeal in *Epstein I*, Owners contended that they pleaded sufficient facts to state a claim under *Bily* against BDO. In the alternative, they argued that they should be given leave to amend to allege a fraud cause of action based on information they learned from the Pennsylvania action. In opposition, BDO argued, among other contentions, that Owners should not be granted leave to amend because they could not show the trial court abused its discretion when it sustained the demurrer without leave to amend and that even if allowed to amend, the fraud claim would also fail under *Bily*.

In July 2007, Division 2 affirmed the judgment in *Epstein I.* Division 2's analysis centered on the scope of an auditor's liability under *Bily* to third parties for negligent misrepresentations in an opinion letter. Division 2 concluded that the allegations in the

negligent misrepresentation complaint failed to establish that BDO was on notice that American would enter into a buyout deal such as the one Redkaren and American entered into and thus, Owners could not establish under *Bily* that BDO had an intent to benefit Owners or those in their class when they audited the financial statements and issued the opinion letter. As to Owners' request to amend, the court concluded: "the trial court did not abuse its discretion in denying leave to amend. . . . But the amendment proposed by the owners was not apparent at the time of the demurrer."

The Fraud Complaint. In September 2007, Owners filed the complaint at issue in this appeal. They alleged a single cause of action for fraud which contains identical allegations to those in the negligent misrepresentation complaint in *Esptein I*. The fraud complaint also adds allegations in paragraphs 29, 57 and 48 which set forth the claims derived from the Pennsylvania action. Those paragraphs specifically allege BDO played a role overvaluing American's assets and BDO participated in the creation of the false financial statements. In addition, in paragraphs 50 through 51 Owners further claim they lacked notice of the falsity of the financial statements until November 2004 when the SEC refused to approve a registration statement for an exchange offer and that Owners did not learn of the extent of BDO's involvement in the valuation of the American's assets until July 2006 when the Pennsylvania action was filed.

BDO filed a demurrer to the fraud complaint on the basis of res judicata, arguing that the fraud claim arose between the same parties, sought the relief for the same harm and sought vindication of the same primary right as the negligent misrepresentation claim in *Esptein I*. BDO argued the fraud claim also failed under *Bily*. Owners opposed the motion arguing that res judicata should not apply because the fraud claim is based on facts that they did not learn prior to the trial court's judgment in *Esptein I* and that because they were denied leave to amend by the court of appeal to include the fraud claim.

The trial court agreed with BDO, sustained the demurrer without leave to amend based on res judicata. The court entered a judgment of dismissal. Owners timely appeal.

DISCUSSION

I. Standard of Review

When reviewing an order sustaining a demurrer without leave to amend, "[t]he reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. [Citations.] The court does not, however, assume the truth of contentions, deductions or conclusions of law. [Citation.] The judgment must be affirmed 'if any one of the several grounds of demurrer is well taken. [Citations.]' [Citation.] However, it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. [Citation.] And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment. [Citation.]" (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966-967.)

II. The Trial Court Did Not Err in Sustaining the Demurrer to the Fraud Complaint Without Leave to Amend Based on the Application of the Doctrine of Res Judicata.

"'Res judicata' describes the preclusive effect of a final judgment on the merits. Res judicata, or claim preclusion, prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them." (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896.) The doctrine is intended to promote judicial economy by precluding piecemeal litigation of claims. (*Id.* at p. 897.) Res judicata is invoked if "(1) the decision in the prior proceeding is final and on the merits; (2) the present proceeding is on the same cause of action as the prior proceeding; and (3) the parties in the present proceeding or parties in privity with them were parties to the prior

proceeding."[3] (*Federation of Hillside Canyon Assns. v. City of Los Angeles* (2004) 126 Cal.App.4th 1180, 1202.) Res judicata bars the litigation of issues that either were or could have been litigated in the prior proceeding. (*Ibid*.; *Weikel v. TCW Realty Fund II Holding Co.* (1997) 55 Cal.App.4th 1234, 1245-1246.)

Whether the prior proceeding and the present proceeding involve the "same cause of action" is determined under the "primary right theory." (*Mycogen*, *supra*, 28 Cal.4th at p. 904.) "'[A] "cause of action" is comprised of a "primary right" of the plaintiff, a corresponding "primary duty" of the defendant, and a wrongful act by the defendant constituting a breach of that duty. [Citation.] The most salient characteristic of a primary right is that it is indivisible: the violation of a single primary right gives rise to but a single cause of action. [Citation.] . . . [¶] As far as its content is concerned, the primary right is simply the plaintiff's right to be free from the particular injury suffered.'" (*Ibid.*; *Balasubramanian v. San Diego Community College District* (2000) 80 Cal.App.4th 977, 992 [concluding the "determinative factor in applying the primary right theory was the harm [plaintiff] suffered"; both the federal discrimination claim and state court breach of contract claim sought recovery for the same harm—plaintiff's having been rejected for the position of assistant professor].)

The primary right "'must therefore be distinguished from the legal theory on which liability for that injury is premised: "Even where there are multiple legal theories upon which recovery might be predicated, one injury gives rise to only one claim for relief." [Citation.] The primary right must also be distinguished from the remedy sought: "The violation of one primary right constitutes a single cause of action, though it may entitle the injured party to many forms of relief, and the relief is not to be confounded with the cause of action, one not being determinative of the other." [Citation.]'" (*Mycogen*, *supra*, 28 Cal.4th at p. 904, italics omitted.) "'"[I]f two actions involve the same injury to the plaintiff and the same wrong by the defendant then the same primary

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[3] Here only the second element of the res judicata doctrine is at issue. Owners do not claim a lack of privity, or that the decision in *Epstein I* is not final or based on something other than the merits.

right is at stake even if in the second suit the plaintiff pleads different theories of recovery, seeks different forms of relief and/or adds new facts supporting recovery. [Citations.]"'" (*Le Parc Community Assn. v. Workers' Comp. Appeals Bd.* (2003) 110 Cal.App.4th 1161, 1170.) The scope of the primary right therefore depends on how the injury is defined. "An injury is defined in part by reference to the set of facts, or transaction, from which the injury arose." (*Federation of Hillside & Canyon Assns. v. City of Los Angeles*, *supra*, 126 Cal.App.4th at pp. 1202-1203.)

Here the trial court found that Owners' fraud complaint was barred by the application of res judicata because the prior action was a "broadly" pled misrepresentation claim and that the fraud claim sought relief based essentially on the same material facts, disclosing essentially the same conduct, the same harm and seeking the vindication of the same right. The court characterized the "new evidence" as not relating to a different right, but instead as evidence that would have buttressed the prior allegations.

We agree with the trial court's conclusion. A comparison of the two complaints reveals that both the fraud and negligent misrepresentation complaints seek vindication of the same primary right, namely, the right to obtain an accurate view of a company's financial value by examining the audited financial statements or stated another way, the right to be free from misrepresentations in the audited financial statements upon which a party relies in entering a business transaction. (See *Henry v. Clifford* (1995) 32 Cal.App.4th 315, 320-321 ["Because the complaint in this action is virtually identical to the . . . complaint in the previous action, it is based on the same primary right, and therefore the same cause of action"].) In addition, both the complaint in *Epstein I* and the fraud complaint here seek relief for the same injury—the loss of millions of dollars as a result of purchasing a company whose assets had been overvalued and misrepresented in the audited financial statements. Indeed the fraud and negligent misrepresentation causes of action are based on the same transaction, acts and representations.

The only differences between the negligent misrepresentation claim in *Epstein I* and the fraud action here are the intent element and BDO's role in the valuation

processes. Neither of these alter the application of the primary rights analysis. First, as to the issue of intent, if Owners were harmed by the alleged representations, they were harmed similarly whether the representations were made negligently or intentionally. (See 4 Witkin, Cal. Procedure, *supra,* Pleading, § 26, p. 70 [action based on negligence cannot be followed by action for same injury alleging intentional wrong].)

Second, concerning BDO's alleged role in the asset valuation and the creation of the financial statements, the allegation that BDO engaged in a different (and additional) tortious act than alleged in the complaint in *Epstein I* does not change the primary rights analysis because the right at issue and the injury are identical. Indeed, a plaintiff is not permitted to maintain successive actions for the same injury by alleging different acts, breaches or violations by the defendant where plaintiff is seeking vindication of the same primary right. (*Panos v. Great Western Packing Company* (1943) 21 Cal.2d 636, 639; *Bay Cities Paving Grading, Inc. v. Lawyers Mutual Ins. Co.* (1993) 5 Cal.4th 854 (*Bay Cities*).)

Bay Cities is illustrative. In *Bay Cities* the court held that only one primary right had been violated where the plaintiff's attorney recorded a mechanics lien but negligently failed to serve a stop notice on the lenders and later negligently failed to file a complaint to foreclose the lien. Even though the plaintiff alleged two distinct acts by counsel, it was deprived of only one primary right. According to the court, the plaintiff "had one primary right -- the right to be free of negligence by its attorney in connection with the particular debt collection for which he was retained. He allegedly breached that right in two ways, but it nevertheless remained a single right." (*Bay Cities , supra,* 5 Cal.4th at p. 860.) The court explained: "Bay Cities contends it had two sources of payment of its construction work: (1) foreclosure of the mechanic's lien, and (2) serving a timely stop notice on the project's construction lenders. These two procedures, however, arose from the same transaction -- Bay Cities' work on the project . . . . Thus, Bay Cities had a single right -- the right to payment for its construction. The loss of that right as a result of the attorney's two omissions resulted in a single injury." (*Id.* at p. 861.)

So too in this case. Though, the Owners now claim BDO not only audited the financial statements, BDO also was involved in the valuation of the assets and creation of the financial statements, the Owners are nonetheless seeking vindication of the same right and same harm as they did in *Esptein I*. Thus, the trial court properly concluded that the doctrine of res judicata applied.

Owners' appeal does not focus on the application of the primary rights doctrine, but instead seeks to avoid the application of res judicata entirely by arguing various exceptions to the doctrine and by arguing waiver. Specifically, Owners assert res judicata does not preclude the assertion of a claim discovered after the first action was filed when the plaintiffs are prevented from asserting those facts in the first action. In the alternative, Owners argue that application of res judicata should be denied when injustice would result or that BDO should be estopped (or deemed to have waived) the res judicata argument. As we shall explain, these arguments are unavailing.

Newly Discovered Facts Exception.

Owners assert res judicata should not be applied where the plaintiff does not discover the new facts or claim until after the first action was filed when the plaintiff is prevented from asserting those facts in the first action ("Newly discovered facts exception"). Owners have gleaned this newly discovered facts exception from *Allied Fire Protection v. Diede Construction, Inc.* (2005) 127 Cal.App.4th 150 (*Allied*).

In *Allied*, plaintiff (Allied) was a subcontractor on a defense contract between the Air Force and the defendant general contractor, Diede. Construction delays resulted in a delay damage settlement between the Air Force and Diede, and Diede paid Allied a portion of the settlement for delay damages it suffered on the project. (*Allied, supra,* 127 Cal.App.4th at p. 152.) Allied subsequently brought a breach of contract claim against Diede in federal court. During discovery in that action, Allied learned that the Air Force had paid Diede additional delay damages which Deide had never disclosed to Allied in connection with the earlier delay damage settlement. Allied unsuccessfully attempted to

amend its complaint in the federal action to assert a claim based on Diede's failure to disclose and pay the additional delay damages.[4]

After the federal action concluded in Allied's favor, Allied brought an action for fraud against Deide in state court seeking the additional delay damages. The complaint alleged Deide made various misrepresentations in connection with the original settlement with the Air Force to induce Allied to accept the delay damages. Deide responded to the complaint, asserting res judicata as an affirmative defense and ultimately filed a motion for summary judgment claiming res judicata applied. Diede argued that both the federal action and the state action involved the invasion of the same primary right: to be free from economic injury due to the wrongful conduct of Diede during the performance of the subcontract. Allied argued in response that two primary rights were involved—the state claim was based on fraudulent conduct and the federal claim was based on breach of contract. (*Allied, supra,* 127 Cal.App.4th at p. 153.) Allied also argued that res judicata should not apply where plaintiff is unaware of facts when filing a complaint. The trial court granted summary judgment for Diede and the Third District Court of Appeal reversed. (*Id.* at p. 154.) The court reasoned that res judicata would not bar an after-discovered claim where the plaintiff is unaware of the facts giving rise to a claim due to defendant's fraud. The court indicated that such a claim should be barred if with diligence it could have been brought earlier. "But where it cannot be said that plaintiff knew or should have known of the claim when the first action was filed, res judicata should not bar the second action." (*Id.* at p. 156.) The court concluded:

"Here, the damage from the alleged misrepresentation occurred before the first suit was filed; the fraud claim existed before the federal action was filed, but it was not discovered. While this fact could militate in favor of requiring an amendment to the original action, we think the better result -- at least where the plaintiff contends the fact

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[4] Deide would not stipulate to allow Allied to amend the complaint and the district court took the delay damage claim out of the federal action unless Allied was able to show due diligence in conducting discovery—something Allied apparently never did. (*Allied, supra,* 127 Cal.App.4th at pp. 152-153.)

was unknown due to defendant's fraud -- is to require the entire claim to be included in the first action only where with diligence it could be discovered prior to filing the initial suit. This rule puts the focus properly on whether plaintiff was diligent in pursuing its claims, not on whether the discovery was made in time to permit an amendment to the complaint." (*Id.* at p. 158.)

Allied is distinguishable. First, in *Allied* the defendant's fraudulent[5] conduct prevented the plaintiff from including its claim in the original federal complaint. In contrast here, Owners do not claim that BDO's conduct prevented them from discovering its alleged role in the creation of the financial statements and the valuation of American. Owner's have not claimed BDO misled them about their role in preparing the financial documents.

Second, unlike here, *Allied* concerned the vindication of two separate rights—namely the right as alleged in the breach of contract claim to be paid pursuant to the subcontract, and the separate right to be free from tortious misrepresentations when entering a settlement agreement.[6] Here, as discussed elsewhere, this case concerns the same right.

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[5] We note, though not at issue here, other cases have recognized a "misrepresentation exception" to res judicata. (See *Gamble v. General Foods Corp.* (1991) 229 Cal.App.3d 893, 902-903.) In *Gamble* the court described the "misrepresentation exception." "'A defendant cannot justly object to being sued on a part or phase of a claim that the plaintiff failed to include in an earlier action because of the defendant's own fraud . . . . [¶] The result is the same when the defendant was not fraudulent, but by an innocent misrepresentation prevented the plaintiff from including the entire claim in the original action.' This rule has been adopted in California." (*Ibid*.) But even in the "misrepresentation exception" cases, the court's analysis will turn upon whether the plaintiff demonstrated diligence in discovery their claims. (*Eichman v. Fotomat Corporation* (1983) 147 Cal.App.3d 1170, 1175-1176.)

[6] The trial court in *Allied* applied the federal "transactional" analysis to the determination of whether res judicata applied rather than the "primary right" analysis applied under California law. (*Allied, supra,* 127 Cal.App.4th at pp. 153-154.) In our view, had the court in *Allied* applied the primary rights analysis it would have denied the application of res judicata and thus would not have reached the issue of whether it should find any exception to it.

In any event, the newly-discovered-facts exception discussed in *Allied* does not assist Owners in this case. Owners have failed to sufficiently allege (or to demonstrate they could allege) they acted with diligence to discover this information. To the contrary, the complaint in this action acknowledges the Owners suspected the financial statements contained false information as early as November 2004, two months before American declared bankruptcy and nearly a year before the original complaint was filed in *Epstein I*. Although Owners assert they did not learn the details concerning BDO's level of involvement in the overvaluation of the assets and the preparation of the false financial documents until the bankruptcy trustee filed the Pennsylvania complaint in July 2006, they fail to explain what they did once they were on notice the financial statements were false (something they alleged in *Epstein I* should have been evident to any competent auditor) or why they did not discover the information prior to the trial court's ruling dismissing their action in *Epstein I.* The bald allegation the bankruptcy trustee had better access to information than they did is insufficient: Once the deal to purchase American was consummated, the Owners' status as outsiders to the company changed and presumably they gained unfettered access to information concerning the finances of the company. In short, the Owners failed to plead facts showing their inability to have made earlier discovery despite reasonable diligence. (Cf. *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 397-398 ["the plaintiff discovers the cause of action when he at least suspects a factual basis, as opposed to a legal theory, for its elements, even if he lacks knowledge thereof -- when, simply put, he at least 'suspects . . . that someone has done something wrong' to him"; "he need not know the 'specific "facts" necessary to establish' the cause of action"].)

In addition, we take issue with Owners' characterization that Division Two "prevented" them from asserting their fraud claim in *Epstein I.* It is true that Division Two did not reverse the judgment in *Epstein I* which of course would have allowed Owners to assert the claim. Nonetheless, Owners' failure to have their fraud claim included in the original action was of their own making. Indeed, Owners framed the issue on appeal in *Esptein I* as a request for leave to amend the complaint to add a claim

for actual fraud where the allegations in the original complaint are nonetheless deemed insufficient. The Owners asserted that the court could nonetheless reverse the judgment to allow amendment of the complaint, even if the court of appeal otherwise concluded the trial court acted within its discretion in sustaining the demurrer. But in doing so, the Owners relied on inapt case law (*Reserve Insurance Co. v. Pisciotta* (1982) 30 Cal.3d 800, 813) which allows the court of appeal to review post judgment events rendering the appeal moot. Division Two considered the narrow issue before it, concluding that it was without authority to reverse a judgment to order an opportunity to amend unless from the operative pleading and its latent potential it appeared that the trial court had abused its discretion in failing to grant leave to amend. Division Two's conclusion is sound, but beside the point.[7] Owners had another possible avenue of recourse to include their new fraud claim in the original action. Specifically they could have filed a writ of corim vobis in *Esptein I* to vacate the judgment to allow them to include their newly discovered evidence in the original complaint. (See e.g., *Rollins v. City and County of San Francisco* (1974) 37 Cal.App.3d 145, 149 [recognizing the availability of the writ following a judgment in a civil proceeding where the error to be corrected does not appear in the record and no other remedy is available]; *In re Rachel M.* (2003) 113 Cal.App.4th 1289, 1296 [holding that when certain requirements are met and under certain drastic circumstances (involving extrinsic fraud) a direct attack on an otherwise final and valid judgment by way of independent action to set it aside may be filed and the court of appeal can issue a writ of coram vobis commanding the trial court to reconsider its decision in light of the newly discovered evidence].) They did not seek any such relief, and thus their complaint that Division Two prevented them from including their fraud claim in the original action is baseless.

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[7] We also note that in concluding that the amendment proposed by Owners was not apparent at the time of the demurrer, Division Two did not pass on the issue of whether that fraud claim involved the same right or same harm as those terms are used in connection with the primary rights analysis at issue here. We do not read Division Two's opinion to contain a view on the application of res judicata.

Injustice Exception.

On appeal, Owners also assert the application of the "injustice exception" to the res judicata bar announced in *Greenfield v. Mather* (1948) 32 Cal.2d 23, 35, wherein the court observed that in rare instances res judicata should "not be applied so rigidly as to defeat the ends of justice or important considerations of policy" (the *Greenfield* Exception). We are unmoved by this argument.

First, we note Owners failed to assert it below and therefore have failed to preserve it for appeal. (*In re S.B.* (2004) 32 Cal.4th 1287, 1293, fn. 2; citations omitted.)

In addition, the continued viability of the injustice exception is less than certain. (See *Slater v. Blackwood* (1975) 15 Cal.3d 791, 796; *Arcadia Unified School District. v. State Dept. of Education* (1992) 2 Cal.4th 251, 258; *Schultz v. Harney* (1994) 27 Cal.App.4th 1611, 1619, fn. 6; *Stuart v. Dept of Real Estate* (1983) 148 Cal.App.3d 1, 4-5; but see *Kopp v. Fair Political Practices Commission* (1995) 11 Cal. 4th 607, 620-622 [applying the public interest exception, but containing references to the injustice exception].) In any event, Owners' reliance on the exception is based on the unfairness they perceive which resulted from Division Two's refusal to grant them leave to assert their fraud claim in *Epstein I*. They claim that having expressly ruled that the fraud claim was not part of the prior action, it is unfair to apply res judicata to the fraud claim in this action. We do not agree. As discussed above, Owners' inability to pursue their fraud claim at this point is attributable to their own litigation strategy in *Epstein I*, not to conduct of Division Two of this Court.

Estoppel/Waiver Argument.

Finally, Owners argue that BDO should be estopped (or deemed to have waived) the res judicata argument because BDO opposed Owners' request on appeal in *Esptein I* to amend the complaint to add the fraud claim. As with the injustice exception, Owners

did not assert this argument in the trial court and thus have failed to preserve it for appeal. In any event, this argument lacks merit.

Owners rely on *United Bank & Trust Co. v. Hunt* (1934) 1 Cal.2d 340, 346 (*United Bank*) to support their waiver argument. In *United Bank*, the Bank successfully opposed Hunt's motion to amend and to consolidate two cases for trial which involved similar issues and the same parties. The trial court denied consolidation notwithstanding Hunt's concern that the failure to consolidate would result in the application of estoppel and res judicata in the second action. (*Id.* at p. 344.) In concluding that the Bank had subsequently waived any argument based on res judicata to prevent the prosecution of the second action, the Supreme Court concluded:

"'We are . . . of the opinion that the Bank waived its right to raise the question of res judicata . . . by its opposition to the motion to amend . . . to include therein the various causes of action . . . and by opposing a motion to try the two cases together. [¶] Where counsel by timely notice call to a court's attention the pendency of other proceedings covering kindred matters and strive to have the same embraced within the scope of the inquiry, and such attempt is successfully blocked by opposing counsel and the trial proceeds to the investigation of the specific issue before the court, counsel who were successful in preventing the consolidation of the issues cannot be heard later to object to a trial of the related matters upon the ground of res judicata. The course pursued by the court and counsel . . . was tantamount to an express determination on the part of the court with the consent of opposing counsel to reserve the issues involved for future adjudication.'" (*United Bank*, *supra*, 1 Cal.2d at p. 345, italics omitted.) The Court further reasoned: "'[a]s to matters, however, which might have been litigated and decided in a former suit as within the scope of the issues, but which were not actually or expressly in issue and adjudicated, only a presumption is indulged in that they were decided. This presumption is, however, a disputable one and may be overcome by showing that although a particular matter was involved in the former action, it was by consent of the parties withdrawn from consideration at the trial and did not at all enter into or constitute any part of the verdict of the jury or final determination of that action. If this is the

situation here, defendant certainly cannot invoke the doctrine of *res adjudicata* against the assertion by plaintiff in this action of a right to the credit claimed. He cannot assert the conclusiveness of the former judgment on that matter if he consented with plaintiff that it might be withdrawn from consideration by the jury as an issue in the former action and it was in fact withdrawn.'" (*Id.* at p. 346, original italics.)

The difference between the matter before this court and that in *United Bank* is plain. Here BDO did not oppose any effort of Owners in the *trial court* in *Esptein I* to amend the negligent misrepresentation complaint to include the fraud claim. Instead, BDO opposed the reversal of the judgment on appeal in *Esptein I* based on sound rationale adopted by Division Two, that Owners had no basis to seek reversal of the judgment or to support the conclusion the trial court abused its discretion in denying leave to amend based on the matters before the trial court at the time it ruled on the demurrer to the negligent misrepresentation complaint. We do not consider anything done by BDO or Division Two as "tantamount to an express determination on the part of the court with the consent of opposing counsel to reserve the issues for future adjudication." Consequently, we decline to find estoppel in this case.

In view of all of the foregoing, we conclude the trial court properly sustained the demurrer without leave to amend.

DISPOSITION

The judgment is affirmed. Respondent is entitled to costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WOODS, J.

We concur:

PERLUSS, P.J. **JACKSON, J.**